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No. 80-1824

IN THE

Supreme Court of the United States

October Term, 1980

LATROBE STEEL COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In its petition for writ of certiorari Latrobe Steel Company presented the following reasons for granting the writ:

1. the decisions below are contrary to Congress' intent in enacting Section 8(d) of the NLRA, 29 U.S.C. §158(d), because they allow the National Labor Relations Board to dictate the procedures which a party to collective bargaining may employ, without regard to the facts and circumstances of the particular negotiations;

2. under this Court's decisions Section 8(d) of the NLRA is to be interpreted so as to encourage collective bargaining, rather than interpreted in the strict and literal manner employed by the Board and Third Circuit in this case;

3. the Board had previously held numerous times that the presence of a professional stenographer at negotiations is a mandatory subject of bargaining under Section 8(d) of the NLRA and those contemporaneous decisions which support Petitioner are entitled to more deference by the courts than the Board's decision in this case;

4. the Third Circuit's decision in this case conflicts with decisions of other courts of appeals, including decisions of the Eighth, First, Fifth and Seventh Circuits;

5. the decisions below are contrary to the law, including Section 8(c) of the NLRA, 29 U.S.C. §158(c), because they prevent the Company from communicating to the employees and other persons a verbatim record of what was said at bargaining

by preventing the Company from insisting upon making the record in the first instance.

United Steelworkers of America has not filed any response to the points made in the Company's Petition. The National Labor Relations Board has filed a Memorandum in Opposition, but that Memorandum does not respond to points 1, 2, 3 and 5 listed above. The Board's Memorandum simply incorporates a Brief in Opposition filed by the Board in another case pending before the Court on petition for writ of certiorari, *Bartlett-Collins Co. v. N.L.R.B.*, No. 80-1662 (petition filed April 1, 1981). The petition for writ of certiorari filed in *Bartlett-Collins, supra,* presents a narrower question for review than the petition filed by the Company in the instant case. Moreover, the petition filed in *Bartlett-Collins, supra,* presented only one issue as reason for granting the writ—that the decision of the Tenth Circuit in that case is in direct conflict with a decision of the Eighth Circuit in *N.L.R.B. v. Southern Transport, Inc.*, 355 F.2d 978 (8th Cir. 1966). Thus, the question presented and issues raised in Latrobe Steel Company's petition in this case are not necessarily presented or raised by the petitioner in *Bartlett-Collins, supra.* Accordingly, even if a writ of certiorari were denied in *Bartlett-Collins, supra,* it would not dispose of the question presented and issues raised by the petition in the instant case.

As to the existence of a conflict among the circuit courts raised in the *Bartlett-Collins* petition (which was also raised by the Company in this case, along with four other issues listed above), the Board's response is incorrect. The Board contends (Mem. in Opp. at 3 n. 2) that the Eighth Circuit's decision in *Southern Transport v. N.L.R.B., supra,* is not in conflict with either the Third

Circuit's decision in this case or the Tenth Circuit's decision in *Bartlett-Collins* purportedly because the Eighth Circuit never considered whether using a professional stenographer to make a record of negotiations constituted a mandatory subject of bargaining. The Board quoted in the Brief in Opposition (at 8) filed in *Bartlett-Collins* part of the Eighth Circuit's decision in *Southern Transport, supra,* attempting to show that the Eighth Circuit only considered whether the employer had acted in good faith. In the next sentence of the opinion following the text quoted by the Board, however, the Eighth Circuit clearly identified the "primary issue" in the case as "the legitimacy of the Respondent's request and insistence, over the objection of the Union, on the presence of a qualified court reporter." *Southern Transport, Inc. v. N.L.R.B., supra,* 355 F.2d at 982. The Eighth Circuit then considered whether the request to use the professional stenographer was not legitimate either because the matter was a non-mandatory subject of bargaining and, therefore, per se unlawful, or because the matter was a mandatory subject of bargaining, and, therefore, unlawful only if the employer had not acted in good faith. 355 F.2d at 982-986.

The Eighth Circuit rejected the Board minority view that the professional stenographer matter was a non-mandatory subject of bargaining, reasoning that Congress would have to amend the NLRA before that result could be obtained. 355 F.2d at 984. Concluding that the request to use the professional stenographer was a mandatory subject of bargaining, the Eighth Circuit held that the employer in *Southern Transport* had not violated the NLRA because he had acted in good faith. Thus, contrary to the Board's assertion, the Eighth Circuit in *Southern Transport* clearly addressed

the question of whether the professional stenographer matter is a mandatory subject of bargaining. The Eighth Circuit's conclusion that the stenographer issue is a mandatory subject is therefore in direct conflict with the decision of the Third Circuit in the instant case, as well as with the Tenth Circuit's decision in *Bartlett-Collins*. The decisions by the First, Fifth and Seventh Circuits cited in the Company's Petition at 18-19 are also in conflict with the decisions of the Third and Tenth Circuits.

In the Brief in Opposition filed for the Board in *Bartlett-Collins*, Respondent freely admits that prior Board decisions had held that, in the absence of bad faith, a party could lawfully demand that negotiations be transcribed by a professional stenographer. The Board attempts to escape the effect of this Court's decisions which require that more deference be given to the contemporaneous administrative interpretation of a statute (which are discussed at pages 15-16 of Latrobe's Petition), by arguing that its earlier interpretation was rendered prior to the decision in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), and that the change in the Board position on this issue was justified by that decision. However, this assertion is belied by the fact that for almost twenty years after the *Borg-Warner* decision, the Board continued to apply the good faith standard in assessing the legality of a party's insistence upon the making of a verbatim record of negotiations or grievance discussions.[1]

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1. *E.g., American Ship Building*, 226 N.L.R.B. 788, *enforced*, 99 L.R.R.M. 2632 (D.C. Cir. 1978); *Southern Transport, Inc.*, 150 N.L.R.B. 305 (1964), *enforcement denied*, 355 F.2d 978 (8th Cir. 1966); *B. F. Diamond Construction Co.*, 163 N.L.R.B. 161 (1967), *enforced*, 401 F.2d 910 (5th Cir. 1969). *See also* the numerous other decisions cited in Pet. at 14-15 n. 7.

Moreover, the Board's attempt to find support for the recent change in position on this issue in the opinions of various industrial relations "experts" is equally unpersuasive. Many of the works cited by the Board in its memorandum in *Bartlett-Collins* were considered by the Board when it formulated and applied its original position that the presence of a stenographer was a mandatory subject of bargaining. *See, e.g., St. Louis Typographical Union,* 149 N.L.R.B. 750, 752 (1963), wherein the Board noted that "it is clear that respected authorities differ in their opinion of the effect of making a stenographic transcript in collective bargaining sessions." Also, even if some commentators do not agree with the practice of using a stenographer during negotiations, that certainly is not a sufficient basis for the Board to change the substantive law by dictating to employers and unions the procedural aspects of bargaining, in clear contravention of the Congressional intent to permit parties to establish their own procedures through good faith bargaining. *See* Pet. at 8-11.

Finally, the interpretation of the Act asserted by the Board does not represent a reasonable and principled application of the Act, and therefore is not entitled to any special deference herein. *See Ford Motor Co. v. NLRB,* 441 U.S. 488, 495-97 (1979). In fact, the Board even admits that under the Third Circuit's decision, both parties to bargaining would commit an unfair labor practice by insisting to impasse on conflicting positions concerning a non-mandatory subject of bargaining such as procedural matters. (Mem. in Opp. at 4-5 n. 4). Under the Board's approach, however, the good faith standard of bargaining is inapplicable to such procedural matters because, in the Board's view, they are non-mandatory subjects of bargaining. There is, there-

fore, no way to break such an impasse under the Board's new approach. It is therefore difficult to understand—and the Board never explains—how that "cat and mouse" game will be avoided wherein a party to collective bargaining can essentially forestall bargaining on substantive issues by rejecting procedural matters (such as the time and place of bargaining, making of a verbatim transcript, length of negotiating session, etc.) raised by the other party.

In short, the position taken by the Board in its memorandum in opposition to Latrobe's petition for writ of certiorari only superficially addresses the broad and important issues raised by Latrobe's petition, and does not even respond to most of the issues raised by Petitioner, such as the fact that the Third Circuit's decision prohibits it from communicating an accurate report of the progress of negotiations to its employees, in violation of Section 8(c) of the Act. Pet. at 19-23. The issues raised in this case are not so simplistic as the Board apparently would have this Court believe. The position of the Board and Third Circuit represents an improper interference with the process of collective bargaining beyond that contemplated by Congress, and conflicts with numerous decisions of this Court, the Board, and of other circuit courts. A writ of certiorari should issue to review and resolve these issues.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, Latrobe respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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